It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision-making authority. As Lord Selborne said as long ago as 1885 in *Spackman* v. *Plumstead District Board of Works* (1885) 10 App. Cas. 229, 240: 'There would be no decision within the meaning of the statute if there were anything ... done contrary to the essence of justice.' See also *Ridge* v. *Baldwin* [1964] A.C. 40.

Their Lordships, in agreement with all the judges in the courts below, would therefore conclude that the ouster clause in section 16 of the Bahamas Nationality Act 1973 does not prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and is *ultra vires*."

The court's power to investigate the question whether the Minister's decision was made with or without jurisdiction must mean that *certiorari* does not lie by way of an undisguised appeal on an error of fact.

We do not imagine for a moment that it was ever contended that the Minister has no right to make the direction that he did make. The only issue is therefore whether he exceeded his jurisdiction or in other words he committed a jurisdictional error in making that direction.

The similarity of trades etc. must basically be determined by the membership rules of the two unions. These rules have been incorporated in the record and were obviously before the Registrar of Trade Unions and the Director-General of Industrial Relations and the High Court had a look at them: see the judgment of the High Court *sub nom. Paterson Candy (M) Sdn. Bhd.* v. *Minister for Labour & Manpower & Ors.*[4] at page 295 for a full reproduction of these rules. The NUCW is in respect, to extract briefly from these rules, of workers in wholesale and resale trading of goods and the provision of commercial services associated therewith. The rules of the MMEU, on the other hand, make it clear that its members are restricted to workers engaged in the manufacture and repair of machinery. Even though it was claimed that the work of the respondent company had now been reduced to consultative status, it is clear that the requirement of similar trades etc. in section 2(2) of the Ordinance favours the MMEU and not the NUCW, and the Minister had not exceeded his jurisdiction or committed a jurisdictional error. The Minister who is not bound to accept the report of the DGIR or the Registrar of Trade Unions has therefore made an order against which no *certiorari* can possibly lie. The decision of the respondent company to recognise NUCW before the decision of the Minister reached it was a deliberate pre-emption in defiance of what it must reasonably expect to be coming from the Minister and in our view it would be manifestly unjust to found *certiorari* on it.

It follows that the appeal must be allowed and the order of the High Court quashed. The respondent shall pay the costs of the proceedings in the High Court and in this court.

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

TEO KIM KIEN & ORS. v. LAI SEN & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 10 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 198 of 1978]

Tort — Negligence — Employee of service station driving motor car belonging to customer — Whether operators of service station liable for negligence of employee — Damages paid by insurers of owner of motor car — Subrogation — Action against operators of service station — Third party action against employee driver.

Insurance — Motor Insurance — Damages paid by insurers of owner of motor vehicle — Subrogation.

In this case the first respondent sent his motor car for a wash and instructed that the car be returned to a certain address and if he was not there to return it the service station. After the car wash, the second respondent, an employee of the service station, drove the car to the address and not finding the first respondent then returned to the service station. On the way back he knocked down an on-coming motor cyclist in circumstances which left no doubt that he was negligent. The motor cyclist sustained injuries and sued the first respondent for damages. The claim was settled by the first respondent's insurers. The insurers also paid for the damages to the first respondent's car and other expenses. Subsequently at the request of the insurers the first respondent brought an action against the appellants, the operators of the service station, to recover the sums paid by the insurers. The defence of the appellant was that (1) the second respondent was at the relevant time the agent of the first respondent and (2) that the first respondent had suffered no loss as the claims had been met by the insurers and therefore the claim was "totally misconceived, frivolous and an abuse of the process of law". The defence also joined the second respondent by way of third party proceedings. The learned Special President Sessions Court gave judgment to the first respondent and dismissed the third party action against the second respondent. She held that it was a case of bailment and that though the second respondent drove the first respondent's car at his request, he was at that time the servant or employee of the appellants, who were thus liable for his negligence. The appeal to the High Court was dismissed and the appellant appealed to the Federal Court.

Held: (1) the finding that the second respondent was the servant or agent of the appellants at the accident was not merely based on abundance of evidence but was also a concurrent finding of fact in the Sessions Court and in the High Court which is beyond the powers of the Federal Court to reverse;

(2) under the doctrine of subrogation the claim of the first respondent against the appellants though brought by the insurers was maintainable;

(3) the appellants were entitled to obtain judgment in the third party action against the second respondent in view of his admitted negligence.

Cases referred to:-

(1) *Mersey Docks & Harbour Board* v. *Coggins & Griffith* [1947] A.C. 1.

(2) *Hobbs* v. *Marlowe* [1978] A.C. 16, 37.

(3) *Morley* v. *Moore* [1936] 2 K.B. 359.

(4) *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.* [1962] 2 Q.B. 330.

FEDERAL COURT.

Ng Yook Woon (*Andrew Saw* with him) for the appellants.

K. Anantham for the 1st respondent.

P.S. Gill for the 2nd respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The facts in this case, save in one particular, are largely undisputed.

The appellants are operators of a service station and service cars as well as wash them. As part of the services they provide they are prepared when required by their customers to send the cars back to their houses or other addresses given by them. The 2nd respondent who was at all relevant times in their employ and held a driving licence used to perform the additional service of returning the vehicles. The 1st appellant was a customer of some standing and he used to get his car sent back to him. This saved him from having to wait. On the day in question, he sent his car for a wash and in the absence of the 1st appellant whom he usually asked, he directed the 2nd respondent to send the car to a certain address and if he was not there to return to the service station where he would pick up the car later. After the wash, the 2nd respondent drove to this address but not finding the 1st respondent there, he returned to the service station as instructed. On the way back, at the entrance to the service station, he knocked down an oncoming motor-cyclist in circumstances that left no doubt of his entire negligence. In a traffic summons case, he therefore pleaded guilty to a charge of negligent driving.

The motor-cyclist sustained injuries to his person and his vehicle was also damaged. He took an action in the Special Sessions Court in Kuala Lumpur against the 2nd respondent as the driver and the 1st respondent as the owner. In the usual way he claimed that the driver was the agent or servant of the 1st respondent or driving with his permission. In any case, there was no doubt of the liability of the 1st respondent under the policy of insurance for the action of the 2nd respondent as the person driving on his orders or with his permission. There being no possible defence, the motor-cyclist's claim was settled for $4,300, by the 1st respondent's insurers. It is of no materiality that the settlement was on the basis of an ex-gratia payment with no admission of liability.

The motor-cyclist sustained compound fractures of the right tibia and fibula which left him with a permanent limb. He claim for personal injuries was limited to a sum under $10,000 to bring his action within the jurisdiction of the Sessions Court. He also claimed special damages in the sum of $613 and loss of earnings at $10 per day. The settlement of $4,000 for both special and general damages and $300 costs would appear to be a very satisfactory one from the point of view of the insurers.

The 1st respondent also sustained damages amounting to $383.35 to his car which the insurers paid in part. The policy of insurance was a comprehensive one, with the now ordinary provision that the insured would be responsible for the first $250 of the loss or expenses incurred. There is no doubt that the 1st respondent was paid the damages less this excess. Certain expenses were also incurred: they were specified as $168.55 for investigation fees, $676 for legal expenses (presumably in settling the claim of the motor-cyclist) and $25 for inspection fees. Clearly these expenses were incurred by the insurers, who were thus $5,552.90 out of pocket. This sum would include the $250 excess not paid to the insured.

The 1st respondent then took action similarly in the Sessions Court at Kuala Lumpur to recover this sum of $5,552.90, interest and costs. Clearly the action was taken in his name by the insurers under the latter's right of subrogation.

The defence was that (i) the 2nd respondent was at the relevant time the agent of the 1st respondent, (ii) the doctrine of "volenti non fit injuria" applied, (iii) the 1st respondent had suffered no loss as the claims of the motor-cyclist and his own claims were settled by the insurers and consequently the claim was "totally misconceived, frivolous and an abuse of the process of law." The defence also joined the 2nd respondent by way of third party proceedings.

The learned Special President Sessions Court gave judgment to the 1st respondent as prayed and dismissed the third party action against the 2nd respondent. She held that it was a case of bailment and that though the 2nd respondent drove the 1st respondent's car at his request, he was at that time the servant or employee of the appellants, who were thus liable for his negligence. The appeal to the High Court was dismissed with costs.

The question raised at the trial was that of service "pro haec vice," and was whether the appellants remained vicariously liable as the general employer or whether the 2nd respondent had become *pro haec vice* the servant of the 1st respondent so that the 1st respondent was liable. This problem was considered by the House of Lords in *Mersey Docks & Harbour Board* v. *Coggins & Griffith.*[1] That case established that no universal and conclusive test can be laid down. *Per* Lord Porter at page 17: "Who is paymaster, who can dismiss, how long the alternative service lasts, what machinery is employed, have all to be kept in mind. The expressions used in any individual case must always be considered in regard to the subject-matter under discussion, but amongst the many tests suggested I think that the most satisfactory, by which to ascertain who is the employer at any particular time, is to ask who is entitled to tell the employee the way in which he is to do the work upon which he is engaged. If someone other than his general employer is authorised to do this he will, as a rule, be the person liable for the employee's negligence. But it is not enough that the task to be performed should be under his control, he must also control the method of performing it." Basically it is a question of fact in each case.

Insofar as the finding that the 2nd respondent was the servant or agent of the appellants at the accident is concerned, that finding is not only based on abundance of evidence but is also a concurrent finding of fact in the Sessions Court and in the High Court which is beyond the powers of this court to reverse.

This case clearly is concerned with the doctrine of subrogation under which an insured must bring an action against the wrong-doer if he is called upon by his insurers to do so and is indemnified against the costs, but it is his own cause of action, not that of his insurer that he sues on; as against the wrong-doer the insurer has no cause of action of his own: *per* Lord Diplock in *Hobbs* v. *Marlowe*[2] at page 37. If the damages suffered by the insured himself either to his person or to his car had been settled and paid to him by the insurer under the policy of comprehensive

insurance, the doctrine of subrogation still applies and the insurer may require the insured to take an action against the wrong-doer for the recovery of all the damages flowing from the latter's negligence. The insured's own interest in the action may be limited to the first part of the damage claim which he had to pay under the excess clause or to the excess of his personal injury claims over what he had been paid by the insurer. If the action succeeds and he recovers a sum in settlement of his claims, he is bound to refund to the insurer what his insurer had paid to him under the policy of insurance. If the wrong-doer was himself covered by a policy of insurance, the existence of a knock for knock agreement between the insurers of the plaintiff and the wrong-doer did not deprive the plaintiff of his right of action against the defendant for the full amount of the damage that he had sustained, though he would also be under a duty to hand over to his insurer that part of the total damages recovered for which he had already been indemnified by it: *Morley* v. *Moore*[3] approved in *Hobbs* v. *Marlowe, supra.*

It is quite clear that the 1st respondent's claim against the appellants was not the concern of any insurers of the appellant and it is not easy to see how *Morley* v. *Moore* came to be considered in the High Court. But under the doctrine of subrogation the claim of the 1st respondent against the appellants though brought by the insurer was to adopt the word used, maintainable.

The reasoning behind the appellants' contention that the doctrine of subrogation did not apply was not so clearly shown as to make it apparent. But Lord Diplock in the case of *Hobbs* v. *Marlowe, supra,* prefers "to regard the doctrine of subrogation in relation to contracts of insurance as having its origin at common law in the implied terms of the contract and calling for the aid of a court of equity only where its auxiliary jurisdiction was needed to compel the assured to lend his name to the insurer for the enforcement of rights and remedies to which his insurer was subrogated: see *Yorkshire Insurance Co. Ltd.* v. *Nisbet Shipping Co. Ltd.*[4] "No need however arises to bring in equity as the policy of insurance in this case, like most standard forms of motor insurance, contained express provisions reserving the right to the insurer "to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise...." It is a matter of express contractual provisions.

The central argument of the appellants against the judgment in favour of the 1st respondent therefore fails and the appeal must be dismissed with costs.

As for the appeal against the dismissal of the 3rd party action against the 2nd respondent, the 2nd respondent's counsel rather surprisingly commenced by supporting the submission of counsel for the appellants. But it is an appeal against the decision that the appellants had no case against him. Both the Senior President and the judge thought so. It is a strange case and not at all common. But for ourselves, we can see no reason why the employer who had suffered damages by the negligence of the servant should not at common law and on the general principle of "*ubi jus ibi remedium*" begin this action. What joy the appellants could get out of a judgment against a person whose financial standing drove him to take this lowly employment is not a matter of concern but the admitted negligence of the 2nd respondent must mean that the appeal against the dismissal of the third party action against the 2nd respondent succeeds. The appellants shall have the costs of this part of the appeal.

Order accordingly.

Solicitors: *Skrine & Co.; Gill & Tang.*

SYARIKAT BUNGA RAYA TIMOR JAUH SDN. BHD. & ANOR. v. TRACTORS MALAYSIA BHD.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 13 & April 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 82 of 1979]

Practice and Procedure — Application for summary judgment — Application granted in High Court — Application for stay of execution — Whether Federal Court can deal with substantive appeal — Substantive question to be tried — Leave to defend — Federal Court (Civil Appeals) (Transitional) Rules 1963, rr. 9 & 25 — R.S.C. 1957, O. 14.

Commercial Transactions — Lease of machinery — Whether lease in fact hire-purchase agreement — Option to purchase given by letter — Claim for rentals — Hire-Purchase Act, 1978.

Evidence — Written agreement — Evidence to vary written agreement — Evidence Act, 1950, ss. 92 & 95.

In this case the respondents by nine agreements in writing leased to the appellants certain expensive machinery. In respect of three of the agreements there were letters which gave the appellants an option to purchase. The appellants fall into arrears of the payment of the rentals and the respondents resumed possession of the machinery and then sued for arrears of rentals. The respondents applied for summary judgment but the appellants contended that the agreements were in reality hire-purchase agreements and were void for non-compliance with the Hire-Purchase Act, 1978. The Senior Assistant Registrar gave leave to defend but, on appeal, the Judge allowed the application for summary judgment. The appellants appealed.

Held: (1) in respect of the three agreements in respect of which there were letters referring to an option to purchase, there were triable issues and leave to defend should be given;

(2) leave to sign final judgment in respect of the machinery in the remaining leasing agreements should be upheld.

Cases referred to:-

(1) *Mohd. Mustafa s/o Seeni Mohd.* v. *Kandasami s/o Kaliappa Gounder* [1979] 2 M.L.J. 109.

(2) *Demuren* v. *Seal Estates* [1979] S.J. 222; 249 E.G. 440.

(3) *Rossvale* v. *Green* [1979] S.J. 610; 250 E.G. 1183.

(4) *Aldrington Garages* v. *Fielder* (1978) 247 E.G. 557.

(5) *Tan Chin Kim Sawmill Factory Sdn. Bhd. & Anor.* v. *Lindeteves-Jacoberg (M) Sdn. Bhd. & Anor.* [1980] 2 M.L.J. 204.

(6) *Diamond Peak Sdn. Bhd. & Anor.* v. *Tweedie F.C.* [1980] 2 M.L.J. 31.

FEDERAL COURT.

V.C. George (*K.S. Narayanan* with him) for the appellants.

Wong Chong Wah for the respondent.

Cur. Adv. Vult.